IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2982 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

AHMEDABAD FIREBRIGADE COOPERATIVE CREDIT &
Versus
EX-CHAIRMAN DECD KAMJIBHAI HARIBHAI THROUGH LEGAL HEIR

Appearance:
1. Special Civil Application No. 2982 of 2001
MR PUSHPADATTA VYAS for Petitioner No. 1
MR GM JOSHI for Respondent No. 1,2/1-2/2,4-5
..... for Respondent No. 2,3
RULE SERVED for Respondent No. 3/1
MR UDAY R BHATT for Respondent No. 6

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 28/06/2002

ORAL JUDGEMENT

This petition is preferred by the petitioner

against the order dated 31.1.2000 passed by the tribunal below application for restoration of the order dated 23.11.1998 passed by the tribunal in revision whereby the revision was dismissed for default.

2. Short facts of the case are that the petitioner who is a registered Coop.Society has filed Lavad Suit No.1215/91 before the Registrar of Board of Nominees and the hearing was fixed on 3.2.95. However, nobody remained present on bahflf of the plaintiff and hence the suit was dismissed. On the date of hearing application for adjournment was made but the same was not accepted by the Nominee. The petitioner has filed Restoration Application No.71/95 which came to be rejected by the learned nominee.

3. The petitioner preferred Revision Application No.287/97 before the tribunal against the aforesaid order passed by the learned Nominee. It is the contention of the petitioner that the revision was fixed for hearing on 23.11.1998, but the learned advocate appearing for the petitioner was sick due to heart surgery and therefore he was unable to remain present before the tribunal. The tribunal on account of absence of the learned advocate for the petitioner dismissed revision application on 23.11.1998. The petitioner, thereafter, preferred Restoration Application No.69/98 before the tribunal and the tribunal found that no ground is made out for restoration and, therefore, rejected the said application for restoration by its order dated 31.1.2000. The aforesaid orders of the tribunal dated 23.11.998 and 31.1.2000 passed below revision application and the application for restoration respectively are under challenge in this petition.

4. On behalf of the petitioner, Mr.Vyas submitted that to satisfy the conscience of the court, the advocate appearing for the petitioner has also filed affidavit stating that he was suffering from heart disease and he had undergone treatment in U.N.Mehta Institute of Cardiology and Research Centre, Ahmedabad. Mr.Vyas submitted that as per the affidavit of the advocate Shri P.D.Patel he was under treatment till April, 1999 and therefore he could not remain present when the tribunal passed the order dismissing the revision application on 23.11.1998. Mr.Vyas therefore submitted that inspite of the said ground being taken the tribunal has overlooked the same and has not properly exercised the discretion for the purpose of restoration of the matter. Mr.Vyas submitted that in view of the aforesaid circumstances,

the petitioner should be given opportunity to have adjudication of the revision on merits.

5. On behalf of respondent Nos 1,2.1, 2.2, 4 & 5 Mr.Joshi has supported the order passed by the tribunal stating that there is no cogent material to show that the advocate of the petitioner was under treatment at the time when the tribunal dismissed the matter. Therefore, he further submitted that the matter was to be decided on the basis of material available before the tribunal.

6. A perusal of the affidavit filed by Mr.P.D.Patel advocate who appeared on behalf of the petitioner shows that he was suffering from heart disease, and had undergone the treatment and was operated at the relevant point of time and was not in a position to attend the court upto April, 1999. The record of the Hospital is also produced which shows that the said advocate was hospitalised from 26.9.98 to 30.9.98 and medical prescriptions are also produced for post operational treatment. Therefore, when the revision came up for hearing before the tribunal on 23.11.1998 it appears that the advocate for the petitioner was under treatment and when he himself has filed affidavit before this court, I find no reason to disbelieve the same. In view of such affidavit, it appears that the advocate for the petitioner could not remain present on account of circumstances beyond his control. The tribunal while deciding the application for restoration has only proceeded on the basis that no document is produced or affidavit is produced for the sickness and the tribunal has further proceeded to observe that if the advocate of the applicant is sick it was his duty to make to make alternative arrangement adjournment in time. Therefore, the tribunal has rejected the request by not accepting the submission made on behalf of the petitioner.

7. Considering the overall facts and circumstances of the case, I find that the petitioner may not be aware about the sickness of his lawyer and therefore reason of remaining absent can not be actually attributed to the petitioner. So far as the lawyer is concerned, as observed earlier, since he was undergoing treatment for heart disease it can well be said that there were circumstances beyond his control for not remaining present at the time when the revision came up for hearing before the tribunal. Therefore, the reason which has

weighed with the tribunal that it was the duty of the party concerned to make alternative arrangement in time does not appear to be supported by material. It is not the case of the other side that the lawyer had intimated the petitioner regarding the sickness. In any event the fact remains that the matter is yet to be examined on merits and therefore considering overall facts and circumstances of the case if the tribunal is directed to decide the matter on merits, it would meet with the ends of justice. At the same time, the respondents shall be entitled to reasonable costs.

8. In the result, the order passed by the tribunal dated 30.1.2000 below the application for restoration and the order dated 23.11.1998 dismissing the revision application on account of absence of advocate for the petitioner, are quashed and set aside and the tribunal is directed to restore the Revision Application No.287/97 on file and is further directed to decide the revision application on merits after giving opportunity of hearing to all concerned within a period of three months from the date of receipt of writ of this court.

9. Considering overall facts and circumstances of the case, I find that since on account of absence of the lawyer of the petitioner, respondents had to incur the costs of this litigation and therefore the petitioner shall pay costs of RS.2,500/- to the respondents.

10. Petition shall stand allowed. Rule is made absolute accordingly.

28.6.02 (JAYANT PATEL,J)